SUPREME COURT OF QUEENSLAND

CITATION:	*Stanley-Clarke v Australian Health Practitioner Regulation Agency & Anor* [2012] QSC 250
PARTIES:	**HEVEN LEIGH (HELEN) STANLEY-CLARKE** Plaintiff **v** **AUSTRALIAN HEALTH PRACTITIONER REGULATION AGENCY** First Defendant And **MEDICAL BOARD OF AUSTRALIA** Second Defendant
FILE NO/S:	S 228 of 2012
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Rockhampton
DELIVERED ON:	7 September 2012
DELIVERED AT:	Rockhampton
HEARING DATE:	27 August 2012
JUDGE:	McMeekin J
ORDERS:	1. The Claim is struck out 2. The plaintiff is ordered to pay the defendants' costs of the application and of the proceedings on the standard basis
CATCHWORDS:	PROCEDURE – PRACTICE UNDER UNIFORM CIVIL PROCEDURE RULES - STATEMENT OF CLAIM – STRIKING OUT – SUMMARY JUDGMENT- application to strike out statement of claim pursuant to r 171 *Uniform Civil Procedure Rules* – whether the plaintiff's pleading discloses a reasonable cause of action *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 *Crowther v Brisbane City Council* [2010] QCA 348 *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R

232

Meshlawn P/L & Anor v State of Qld & Anor [2010] QCA 181

Tame v New South Wales (2002) 211 CLR 317

Stuart v Kirkland-Veenstra (2009) 237 CLR 215

Health Practitioner Regulation National Law Act 2009 (Qld)

Uniform Civil Procedure Rules 1999 (Qld) rr 155, 171, 293

COUNSEL: Plaintiff in person

S Gallagher for the defendants

SOLICITORS: Plaintiff in person

Rodgers Barnes & Green for the defendants

[1] **McMEEKIN J:** This is an application to strike out the plaintiff's Statement of Claim pursuant to r 171 of the *Uniform Civil Procedure Rules* 1999 (Qld) (UCPR). The plaintiff has cross applied to strike out the strike out application. Rule 171(1) UCPR provides that a pleading that discloses no reasonable cause of action may be struck out. The defendants contend the Statement of Claim here merits that description.

[2] The plaintiff, Ms Stanley-Clarke, appears in person. She is not legally qualified.

Background

[3] Ms Stanley-Clarke, underwent surgery at the hands of Dr Robert Boyle, a specialist plastic surgeon. She was not happy with the result.[1]

[4] Each of the defendants are bodies corporate established under the provisions of the *Health Practitioner Regulation National Law Act* 2009 (Qld) ("the National Law").[2] The Australian Health Practitioner Regulation Agency is the first defendant. Its functions include the provision of administrative assistance and support to the Medical Board of Australia, the second defendant, and its committees in the discharge of their functions.[3] The first defendant is required to establish an efficient procedure for receiving and dealing with complaints (termed "notifications" under the National Law) against registered health practitioners such as Dr Boyle.[4] The second defendant is required to oversee the receipt, assessment and investigation of notifications about practitioners such as Dr Boyle.[5] The second defendant delegated to a committee its function of assessing notifications as it was entitled to do.[6]

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1 Ms Stanley-Clarke has brought proceedings for damages against the surgeon. I dismissed those proceedings as being brought out of time: see *Stanley-Clarke v Boyle* [2012] QSC 196. My decision is under appeal.

2 Sections 23(1) and 31(1) of the Schedule to the National Law respectively

3 Section 25(a) of the Schedule to the National Law

4 Section 25(i) of the Schedule to the National Law

5 Section 35(1)(g)(i) of the Schedule to the National Law

6 Sections 36(1) and 37(1)(a) of the Schedule to the National Law

[5] Ms Stanley-Clarke made a complaint to the first defendant about Dr Boyle. The complaint came before a duly authorised committee of the second defendant which decided to take no further action on it as it was "lacking in substance." Ms Stanley-Clarke was so advised. She asked the committee to reconsider their decision on the basis of what she called new information. The committee considered that there was no reason to reconsider the earlier decision in the light of that further information.

[6] In so determining the notification the second defendant acted pursuant to s 151(1) of the Schedule to the National Law which provides:

> "(1) A National Board may decide to take no further action in relation to a notification if—
>
> (a) the Board reasonably believes the notification is frivolous, vexatious, misconceived or lacking in substance."

The Pleadings

[7] By her Claim Ms Stanley-Clarke seeks "damages and/or equitable and/or exemplary damages" from the defendants for:

(a) Failing to provide a fair and impartial decision on the plaintiff's official complaint;
(b) Failing to provide the plaintiff with written reasons "specific and applicable to the plaintiff's case";
(c) Actively ignoring the evidence which was before them and thereby obstructing the plaintiff's right to natural justice;
(d) Actively and knowingly placing the standard of the plaintiff's present and future health care in serious jeopardy;
(e) Demeaning the standard of health care the plaintiff was entitled to at the time of the plaintiff's complaint;
(f) Obstructing the plaintiff's "flow of natural justice by stating on many occasions that a decision by defendant 2 cannot be reviewed or appealed";
(g) Employing bullying tactics in an effort to force the plaintiff to withdraw her application for review of the decision;
(h) Failing to comply with "HPRN Law Act 2009 Part 1 4"[7] throughout the entire complaints process thereby obstructing the plaintiff's natural justice and bringing the integrity of the entire National Scheme into question;
(i) Invading the plaintiff's civil rights, and by extension the Australian Public's civil rights, to a high standard of health care by actively and knowingly contributing to validation of unacceptable practices, unacceptable ethics and falsity by Australian Medical Practitioners.

[8] To a significant extent the Statement of Claim consists of statements of matters that the plaintiff believed or took into account. A good example is paragraph 4: "The plaintiff considered there was too much evidence available for defendant 2 to have concluded the notification lacked substance". As the defendants' Defence asserts allegations of this type are irrelevant to this, and, I suspect, any possible, cause of

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[7] Although not defined in the Claim or Statement of Claim evidently a reference to the *Health Practitioner Regulation National Law Act* 2009 (Qld). "Part 1 4" I think is a reference to Part 1 s 4 of the Schedule to the Act which provides under the heading "How functions to be exercised": "An entity that has functions under this Law is to exercise its functions having regard to the objectives and guiding principles of the national registration and accreditation scheme set out in section 3."

action. To the extent that the pleading consists of such statements it is liable to be struck out as unnecessary, vexatious and embarrassing. But the complaint here goes deeper than that.

[9] So far as material the Statement of Claim relates the fact of the plaintiff's complaints, the determination by the second defendant that her complaint was lacking in substance, the claim by the defendants that they had considered all of the information provided in reaching that conclusion, and the refusal to give reasons. The pleading otherwise largely repeats the plaintiff's assertions set out in the Claim that I have detailed above. There is no pleading of the damages claimed contrary to r 155 UCPR.

[10] By a document entitled "Further Particulars and Reply to Defence"[8] the plaintiff corrects that latter omission in response to the defendants' complaint in their Defence that the requirements of r 155 UCPR had been ignored. She particularises her damages at one place in the sum of $1,568,389.80. That sum is made up as follows: $600 for failing to provide a fair and impartial decision; $30,000 for failing to comply with National Law; $12,000 for failing to provide reasons; $750,000 for obstructing the plaintiff's right to natural justice; $750,000 for invading the plaintiff's civil rights and by extension the Australian Public's civil rights; and the separate sums of $600, $18,000 and $7,189.80 for "employing bullying tactics in an effort to prevent a review of the decision by defendant 2 from reaching its target."

[11] The complaint regarding the adoption of "bullying tactics" appears to be a reference to the defendants applying to strike out proceedings brought by the plaintiff in the Queensland Civil and Administrative Tribunal on the basis that that Tribunal had no jurisdiction, a view that her Honour Judge Kingham agreed with. The sum of $7,189.80 referred to in the "Particulars" apparently represents the defendants' costs that the plaintiff was ordered to pay by Judge Kingham. The claim that the plaintiff asserts, to the effect that the defendants breached some duty owed to her by their exercising a right to apply to QCAT to have struck out a claim that QCAT had no jurisdiction to entertain, is plainly hopeless. That part of the pleading is liable to be struck out as frivolous and vexatious. But again the defendants' complaint is more fundamental.

[12] The general damages claimed are said to reflect the plaintiff's loss of time (*inter alia*, in researching her options, writing to the Health Minister, the Premier and the Prime Minister, preparing an online petition with a view to initiating changes to legislation for a mandatory oath of impartiality to be taken by members of "the board", and preparing a special web page to alert the Australian Public to acceptance of unsafe practices by cosmetic surgeons), emotional distress, human suffering and loss of well-being (which as further particularised[9] relate, principally at least, to the consequences of the initial surgery), and the defendant's "callous disregard" for the plaintiff's pain and suffering.

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8 A 32 page document that does not clearly distinguish between the provision of so called particulars - none of which were requested - and Reply. If the document is said to form part of the Statement of Claim (by the endorsements on it the plaintiff claims to have delivered it pursuant to r 160) then it is open to the serious objection that it obscures rather than illuminates the case the plaintiff seeks to propound. That is so because it is not "as brief as the nature of the case permits" (contrary to r 149(1)(a) UCPR), is not restricted to material facts but sets out the plaintiff's evidence (contrary to r 149(1)(b) UCPR) and arguments.

9 See para 1(c)(3) of the Further Particulars and Reply to Defence

[13] No facts are pleaded that show any possible connection between the defendants and the consequences of the surgery. To the extent that the claim seeks to make the defendants liable for the antecedent damage caused by the surgery performed by Dr Boyle then it too is liable to be struck out as embarrassing or as tending to delay the fair trial of the proceeding.

[14] In her particulars of the nature of the loss or damage suffered there is a statement that the defendants "validated [Dr Boyle's] actions as acceptable to the NRAS thereby demeaning the standard of health care the plaintiff had a legal entitlement to in Australia, and jeopardising the standard of health care for the entire Australian public by condoning practices unacceptable in the Code of Conduct." To the extent that the plaintiff seeks to agitate her proceedings to protect the general public she lacks standing. Absent any specific statutory entitlement the general principle is that to have standing to bring a proceeding, an individual must have interests in the nature of "proprietary, material, financial or special interest[s] in the subject matter of the proceeding". It is not sufficient merely to be interested in the subject matter, in the sense of having "a mere intellectual or emotional concern" with the only advantage to be gained "the satisfaction of righting a wrong, upholding a principle or winning a contest". Such a person is not "someone whose interests are affected". See generally *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493, [1979] HCA 1; *Crowther v Brisbane City Council* [2010] QCA 348 per Holmes JA at [9].

[15] In another part of the "Further Particulars and Reply to Defence", the plaintiff purportedly explains the circumstances in which the loss or damage was suffered. The claims here seem to contradict, or at least not sit comfortably with, the earlier particularisation. The plaintiff here seeks $12,000 general damages, $1,500,000 punitive damages,[10] and special damages of $8,389.80 and $48,000 for "point 1.(c)(1)" and "point 1.(c)(2)" respectively. These appear to be references back to the "particulars" earlier given in response to para 23(b) of the Defence – in which case $48,000 is claimed for the alleged loss of time - time spent researching and agitating for change – calculated at $20 per hour for 80 weeks at 30 hours per week.

Discussion

[16] To succeed in her claim the plaintiff must at least plead sufficient facts so as to show that the defendants owed her a duty, that they breached that duty and that the losses claimed were caused by the breach pleaded.

[17] As to the pleading of duty the closest that the plaintiff comes to doing so is in paragraphs 13, 14 and 15 of the Statement of Claim. Construing the pleading as charitably as possible the plaintiff seeks to argue that the defendants were under a duty imposed by the National Law:

(i) to "provide a fair and impartial decision on the plaintiff's complaint";
(ii) to consider, and not to ignore, the evidence before them in reaching their decision;
(iii) to otherwise comply with the National Law and the National Registration and Accreditation Scheme in reaching their decision;

[10] With a request that they be paid to nominated charities

(iv) to have regard to the plaintiff's pain and suffering in reaching their decision; and

(v) to provide written reasons for the disposal of the complaint.

[18] I observe that no mention is made in the Statement of Claim of any specific legislative provision imposing any of the duties asserted or from which it ought to be inferred that duties are owed. There are references to numerous provisions of the National Law in the "Further Particulars and Reply to Defence" – at least[11] to sections 3(2) and (3), 4, 25(i), 35(c), 144, 149, 151 and 199 (the last said not to be applicable), to the Universal Declaration of Human Rights, and extensive reference is made to a "Code of Conduct" that remains unidentified in the document but which might well be known to the defendants.[12]

[19] Section 3, which sets out the objectives and guiding principles of the National Law, provides, so far as seems material:

> (1) The object of this Law is to establish a national registration and accreditation scheme for—
>
> (a) the regulation of health practitioners;
>
> …
>
> (2) The objectives of the national registration and accreditation scheme are—
>
> (a) to provide for the protection of the public by ensuring that only health practitioners who are suitably trained and qualified to practise in a competent and ethical manner are registered;
>
> ….
>
> (3) The guiding principles of the national registration and accreditation scheme are as follows—
>
> (a) the scheme is to operate in a transparent, accountable, efficient, effective and fair way;
>
> …
>
> (c) restrictions on the practice of a health profession are to be imposed under the scheme only if it is necessary to ensure health services are provided safely and are of an appropriate quality.

[20] The remaining provisions set out the functions of each of the defendants, which I have set out above[13] (s25(i) and 35(c)), the grounds for a voluntary notification (s144), the duty on the second defendant to make a preliminary assessment and determination of a notification (s149), and the circumstances in which the second defendant can take no further action on a notification (s151).

[21] Given the imprecision of the plaintiff's pleading it is not easy to characterise her case. The question that I think I should address is whether the defendants came under a duty of care of the kind pleaded (*sic*), actionable at the suit of the plaintiff, to avoid causing the losses claimed? Effectively the duty alleged is one to protect the plaintiff from harm in the manner of exercise of the statutory power conferred by the National Law.

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11 There may be some that I have missed - the plaintiff has not collected the provisions together in any meaningful way in the document

12 See pp17-26 of the "Further Particulars and Reply to Defence". The "Code of Conduct" referred to may be a reference to "Good Medical Practice: A Code of Conduct for Doctors in Australia"

13 At [4]

[22] For present purposes the statement of Gummow, Hayne and Heydon JJ in *Stuart v Kirkland-Veenstra*[14] provides a guide to the approach that should be taken to a claim that a duty of care is owed by these statutory bodies:

> "There can be no duty to act in a particular way unless there is authority to do so. Power is therefore a necessary condition of liability but it is not a sufficient condition. Statutory power to act in a particular way, coupled with the fact that, if action is not taken, it is reasonably foreseeable that harm will ensue, is not sufficient to establish a duty to take that action. Rather, as was pointed out in *Graham Barclay Oysters Pty Ltd v Ryan* … the existence or otherwise of a common law duty of care owed by a statutory authority … 'turns on a close examination of the terms, scope and purpose of the relevant statutory regime'. Does that regime erect or facilitate 'a relationship between the authority … and a class of persons that, in all the circumstances, displays sufficient characteristics answering the criteria for intervention by the tort of negligence?'
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> **Evaluation of the relationship between the holder of the power and the person to whom it is said that a duty of care is owed will require examination of the degree and nature of control exercised over the risk of harm that has eventuated, the degree of vulnerability of those who depend on the proper exercise of the relevant power, and the consistency or otherwise of the asserted duty of care with the terms, scope and purpose of the relevant statute**. Other considerations may be relevant … ." (emphasis added)

[23] Consideration of the three factors identified by Gummow, Hayne and Heydon JJ in *Stuart* suggests very strongly that no relevant duty of care was owed to the plaintiff by the defendants.

[24] As to the first of the three matters the defendants had no control whatever over "the risk of harm that has eventuated".

[25] To the extent that the plaintiff seeks recompense for the time spent by her in researching evidence and options and agitating for change, the claimed harm is entirely subject to the plaintiff's will. In one sense the defendants did have control over the extent to which the plaintiff suffered distress at her notification being rejected – they could have acted on her notification. But the only way to avoid that harm was to find in the plaintiff's favour. Save and unless they were obliged to find in favour of any complaint brought before them this "harm" is, potentially at least, an inevitable result of a rejection of a notification. That they had no such obligation is self evident and contrary to the obligation imposed by s 151 of the Schedule to the National Law.

[26] As to the second of the three factors identified in *Stuart* the plaintiff was not vulnerable in the sense intended. No legitimate interest or right of the plaintiff's could be potentially adversely affected by the defendants exercising their functions. The point of the notification procedure is to enable the second defendant to maintain the standards expected of health professionals, not to vindicate the rights of third parties, such as the plaintiff.

[27] So much is clear from the objects set out in s 3, mentioned above, and from s 140 which deals with "notifiable conduct" and the potential outcomes of the notification procedure. Section 140 provides:

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14 (2009) 237 CLR 215 at 254 [112]-[113] – footnotes omitted

> ***"notifiable conduct***, in relation to a registered health practitioner, means the practitioner has —
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> (a) practised the practitioner's profession while intoxicated by alcohol or drugs; or
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> (b) engaged in sexual misconduct in connection with the practice of the practitioner's profession; or
>
> (c) placed the public at risk of substantial harm in the practitioner's practice of the profession because the practitioner has an impairment; or
>
> (d) placed the public at risk of harm because the practitioner has practised the profession in a way that constitutes a significant departure from accepted professional standards."

[28] If the first defendant had thought that the notification had substance it was empowered to do a number of things – it could cancel the registration of the practitioner, suspend the practitioner, impose a condition on their continuing to practise, investigate the matter further, refer the matter to a health complaints entity, have a health or performance assessment performed or obtain an undertaking from the practitioner.[15] The significant point is that all these actions concern the practitioner. There is no provision dealing with the notifier save that they be advised of the determination.[16]

[29] The third factor identified in *Stuart* is the "the consistency or otherwise of the asserted duty of care with the terms, scope and purpose of the relevant statute". No duty will be imposed where the imposition of a duty of care would be an unreasonable burden on the defendants bearing in mind the defendants' public obligations under the governing Act.[17]

[30] The plaintiff's claim is quite at odds with the purpose of the National Law. To expose any body charged with the determination of potentially disputed issues to claims for damages seems completely inimical to their proper functions. No doubt the second defendant was under a duty to impartially consider her notification and determine it in accordance with the evidence presented, as the plaintiff asserts. But those very features tend strongly to suggest that the defendants came under no duty of care to a disappointed notifier. The discussion by Chesterman JA in *Meshlawn Pty Ltd & Anor v State of Qld & Anor*[18] of the position of those holding quasi judicial office is apposite here. While the defendants are not arbitrators Chesterman JA's remarks concerning those exercising an arbitral function highlights the critical feature of the defendants' position. His Honour said[19]:

> "It is that the nature of the arbitral function does not lend itself to the imposition of a duty of care to the parties to the arbitration because it is incompatible with the obligation to decide the conflict with strict impartiality. In *Chambers v Goldthorpe* [1901] 1 QB 624 Collins LJ said (638-639):
>
> > "Can (the arbitrator) address himself to his duty in the matter of giving that certificate free from any obligation towards that other party, or is he placed in a position in which it is his duty to exercise his judgment impartially as between the parties to the contract? It appears to me that

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15 See ss 156 – 170 of the Schedule to the National Law

16 Section 151(3) of the Schedule to the National Law

17 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 per Gaudron J at 231

18 [2010] QCA 181 at [105]-[113]

19 At [112]

> he is placed in the last-mentioned position. That being so, the case seems to come exactly within the law as laid down in *Stevenson v Watson*."

> *Stevenson v Watson* (1879) 4 CPD 148 decided that arbitrators are under no duty to the disputants other than one of honesty."

[31] In my view, quite apart from the special position of a statutory authority, there are other fundamental difficulties with the plaintiff's case. According to the pleaded case the loss that the defendants were to avoid causing was firstly, the plaintiff spending time in the various ways that she particularises and secondly, her distress and suffering. As particularised the first is a form of economic loss,[20] the second emotional distress not said to amount to psychiatric injury. The law has circumscribed the right to claim such damages as Gleeson CJ explained in *Tame v New South Wales*[21]:

> "One of the reasons for the rejection of a general rule that one person owes to another a duty to take care not to cause reasonably foreseeable financial harm is that the practical consequence of such a rule would be to impose an intolerable burden upon business and private activity. Furthermore, such a rule would interfere with freedoms, controls and limitations established by common law and statute in various contexts. Unscientific as may be the distinction between "pure" economic loss, "parasitic" economic loss, and damage to property, the care which the law requires people to show for the person or property of others is not matched by a corresponding requirement to have regard to their financial interests. The distinction is not based on science or logic; it is pragmatic, and none the worse for that.
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> … It was common ground in argument that, save in exceptional circumstances, a person is not liable, in negligence, for being a cause of distress, alarm, fear, anxiety, annoyance, or despondency, without any resulting recognised psychiatric illness. Bearing in mind that the requirement of causation is satisfied if a defendant's conduct is *a* cause of the damage complained of, and the manifold circumstances in which one person's conduct may be a factor in inducing an emotional response in another, the consequence of imposition of such responsibility would be to impose an unacceptable burden on ordinary behaviour."

[32] No facts are pleaded which would support the imposition of a duty to protect a notifier from "reasonably foreseeable financial harm". There is nothing in the legislation which says so. Nor is it self evident that an adverse decision could expose a notifier to a risk of such loss. Quite apart from those restrictions the claimed economic loss here cannot be characterised as "reasonably foreseeable financial harm". And there are no exceptional circumstances pleaded here that can give rise to any duty to avoid causing the plaintiff distress.

Conclusion and Orders

[33] As I have pointed out the Statement of Claim is in many respects embarrassing, vexatious and frivolous. If that were all then there might be some point to granting the plaintiff leave to re-plead. However I have come to the clear view that the plaintiff's claim is hopeless. Her pleading does not disclose a reasonable cause of action, nor can I see that one could ever be shown.

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20 The $48,000 referred to in para [15]

21 (2002) 211 CLR 317; [2002] HCA 35 at [6]-[7] – footnotes omitted

[34] The defendants seek that the Claim be struck out. Effectively the defendants seek summary judgement – see r 293 UCPR. I am conscious of the caution that should be exercised in so ruling: *Deputy Commissioner of Taxation v Salcedo*.[22] I am satisfied to the requisite degree that the plaintiff has no real prospect of succeeding and that there is no need for a trial of the claim.

[35] I order that the Claim be struck out.

[36] I order the plaintiff to pay the defendants' costs of the application and of the proceedings on the standard basis.

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22 [2005] 2 Qd R 232